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CITATIONS

723783—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 697

FORT HOWARD PAPER COMPANY, DENNISON MANUFACTURING COMPANY, AND THE REYBURN MANUFACTURING COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 433) is reported in 156 F. 2d 899.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on August 20, 1946 (R. 448–449). The petition for a writ of certiorari was filed on November 15, 1946. The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act as amended, c. 49, 52 Stat. 111, 15

U. S. C. 45, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Commission's finding that petitioners were parties to an agreement and combination to restrain and suppress price competition in the sale of crepe paper is supported by substantial evidence.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111, 15 U. S. C. 45, provides in part:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

This is a proceeding under Section 5 of the Federal Trade Commission Act instituted by the Commission in 1941 against eight companies which comprise all the manufacturers of crepe paper in the United States and against the National Crepe Paper Association of America, a trade association the members of which are crepe

paper manufacturers. The respondents in the Commission's proceeding will be collectively referred to as the respondents, the eight manufacturers as the respondent manufacturers, and the trade association as the Association. The petitioners before this Court are three of the respondent manufacturers, Fort Howard Paper Company, Dennison Manufacturing Company, and The Reyburn Manufacturing Company, which will be respectively referred to as petitioner Fort Howard, petitioner Dennison, and petitioner Reyburn. Petitioners Dennison and Reyburn resigned from the Association in 1939 and its membership at the time of the Commission's proceeding consisted of the other six respondent manufacturers.

The Commission, after a hearing, made findings of fact which may be summarized as follows:

Respondent manufacturers organized the Association in July 1933 and at the same time adopted a constitution and elected an executive committee (R. 338). This committee decided that it was necessary to draw up, in addition to a Code of Fair Competition, a trade agreement containing standard practices with reference to terms, datings, contracts, standards of lengths, widths, and weights of crepe paper, freight allowances, selling prices, etc., and agreements along these lines were entered into by the members of the Associa-

tion disclose agreements made during the latter part of 1933 and the early part of 1934 regulating sale of obsolete or damaged crepe paper as seconds, the maximum lengths of crepe paper, creping ratios (i. e., the relationship between length of paper before and after it has been subjected to the creping process), publication of price schedules providing for quantity differentials and adherence to published prices, adoption of price zones as fixed by a map, price schedules for bulk crepe paper,[1] publication of all price lists and filing them with the Association (R. 339–342).

Respondents have, by mutual agreement, continued the practices which they adopted during the period in which the National Industrial Recovery Act was in effect (R. 342–343). The minutes of subsequent meetings of the Association show agreements made by the members as to customer classification, adopting a new price structure which would reduce the number of price brackets, standardizing creping ratios, discontinuing certain kinds of crepe paper, giving simultaneous notice to the Association by telephone or telegraph when a member changes his published price list, furnishing promptly to the Association copies of orders and invoices, and classification of purchasers by the Association upon the basis of

[1] As to this, the minutes state: "On all of the above price schedules which have been sent you, complete information relative to terms, packing, freight allowance, etc., has been given" (R. 341).

their average total purchases during a six-months' period (R. 343–345).

Respondents agreed and combined to restrain and suppress price competition in the sale of crepe paper (R. 345). Pursuant thereto, respondents established and maintained a "zoning plan", under which the United States was divided into zones with definite geographical boundaries and uniform delivered prices were established for all purchasers within a particular zone, with uniform price differentials among the several zones; purchasers were divided into classes for pricing purposes depending upon the quantity of paper purchased and upon whether they were regarded by respondents as jobbers, syndicates, etc., with uniform price and price differentials established for each class of purchasers; price lists showing current and future prices were filed with the Association for dissemination among its members; as an aid to maintenance of uniform prices, such matters as creping ratios, sizes and weights of crepe paper, and the sale of seconds were regulated (R. 345–346).

Not only do the Association minutes make evident the foregoing combination and agreement, "but the record is replete with correspondence between the Association and its members, and among a number of the members themselves, showing the existence of price agreements" (R. 346).

The Commission concluded that the practices found by it constitute unfair methods of competi-

tion (R. 347). The order which it entered directs the respondents to cease and desist, in connection with the interstate sale of crepe paper, from cooperating in or carrying out any planned common course of action, agreement, or understanding to do any of the following things: maintaining uniform sales prices; establishing or maintaining delivered price zones or price differentials between or among such zones; classifying customers for pricing purposes; standardizing creping ratios, sizes or weights of crepe paper or the sale of seconds with the purpose or effect of maintaining uniform prices; filing with the Association price lists showing current or future prices (R. 348–349).

On petitions to review the Commission's order, the court below unanimously held that the Commission's findings were supported by substantial evidence and that its order should be affirmed (R. 445). As to the Commission's finding of an agreement among respondents to suppress competition, the court said (R. 442): "It was not a finding based simply on inference. It was a finding of fact based on actualities."

ARGUMENT

As stated by petitioners (Pet. 7), the respondent manufacturers sell at an f. o. b. mill price freight allowed, which means that the buyer pays the freight and deducts it from the f. o. b. mill price in making remittance to the seller. Under

this system the delivered cost to every buyer in a particular zone is the same, namely, the seller's f. o. b. mill price. Since, as petitioners concede (Pet. 7), the mill prices of the respondent manufacturers are generally identical, they all sell to all purchasers within any zone at the same delivered price. As a further guarantee against price competition, all of the respondent manufacturers use the same three geographical price zones and the same price differentials between them.[2] The agreements which they make, as found by the Commission, as to classification of customers, standardization of product, and trade practices likewise serve to maintain price uniformity.

Petitioners, relying upon certain oral testimony that crepe paper is a standardized product which cannot be sold in any given market at a price higher than that of any competitor, contend that in this situation the delivered prices of all sellers are bound to be uniform and any finding that such prices are the product of combination lacks evidentiary support (Pet. 8–9). The price zones they explain away upon the basis of testimony that these zones, which were established by agreement in the NRA period, thereupon became a custom of the industry which no respondent manufacturer had reason to change.

The testimony relied upon is not, at least for the most part, in conflict with the Commission's

[2]As to packaged crepe paper, there were two zones, which split the nation into two, but not equal, parts (R. 443).

finding of combination; it merely constitutes evidence from which absence of combination might be inferred. Even in this respect the evidence, as the court below noted (R. 442–443), is quite unpersuasive. In any event, the evidence lays no foundation for asserting error in the Commission's determination. The law is clear that it is for the Commission, not the courts, to resolve conflicts in the evidence and the factual inferences to be drawn from the evidence.[3]

Petitioners complain (Pet. 8–9) that the Commission did not make findings regarding facts as to which there is said to be "uncontradicted evidence." But the want of findings in no way establishes that the Commission failed to give the testimony consideration. In *United States Maltsters Ass'n.* v. *Federal Trade Commission,* 152 F. 2d 161, 165 (C. C. A. 7), which the court below referred to (R. 443) as a case of "striking similarity of issues", the court, in disposing of a similar contention, said:

> It is true that the Commission made no findings upon petitioners' theory in this respect. It does not follow, however, that such factors were ignored. It merely indicates, so we think, that the Commission, after considering all the evidence, came to the conclusion, and we think correctly, that

[3] *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73, 77; *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 117; *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 61, 63.

> it was more reasonable to believe that petitioners' price structure resulted from an agreement rather than economic factors.

The Commission's finding that petitioner Fort Howard was a party to the combination to restrain and suppress price competition is not to be rejected merely because this petitioner did not attend (see Pet. 4-5, 20) some of the Association meetings referred to in the Commission's findings. This petitioner remained a member in good standing of the Association and, as such, received copies of the minutes of its meetings, various memoranda of the Association dealing with trade practices, and information sent out by it with reference to prices of various respondent manufacturers,[4] and there is no evidence that the petitioner ever protested these activities. In *Phelps Dodge Refining Corp.* v. *Federal Trade Commission,* 139 F. 2d 393, 396 (C. C. A. 2), which affirmed an order directed against a combination to restrain competition, the court said as to a like situation:

> Thus the issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting un-

[4] R. 49–50, 58–59, 65, 114, 119, Comm. Exs. 29, 41.

> lawfully his failure to dissociate himself from them is a ratification of what they are doing.

The resignation of petitioners Dennison and Reyburn from the Association is not a reason for setting aside the Commission's order as to these petitioners (see Pet. 6, 20). It has been repeatedly held that the Federal Trade Commission Act authorizes the Commission to issue orders against practices which have been discontinued, in order to prevent a resumption of the practices found to be unlawful.[5] In addition, the resignation of these petitioners furnishes little, if any, indication that they thereby intended to disassociate themselves from the combination to restrain price competition. Petitioner Dennison shortly before its resignation formulated, and urged the Association members to adopt, an agreement providing for the filing of price information and duplicate invoices, limitation of production, and payment of liquidated damages for any violation of the agreement (Comm. Exs. 37, 38–A–E, 160, 161–A–H). The resignation of this petitioner following failure

[5] The following is only a partial list of the authorities: *Sears, Roebuck & Co.* v. *F. T. C.*, 258 Fed. 307, 310 (C. C. A. 7); *Butterick Co.* v. *F. T. C.*, 4 F. 2d 910, 912 (C. C. A. 2), certiorari denied, 267 U. S. 602; *Arkansas Wholesale Grocers' Ass'n.* v. *F. T. C.*, 18 F. 2d 866, 871 (C. C. A. 8), certiorari denied, 275 U. S. 533; *Armand Co.* v. *F. T. C.*, 78 2d 707, 708 (C. C. A. 2), certiorari denied, 296 U. S. 650; *Bunte Bros., Inc.* v. *F. T. C.*, 104 F. 2d 996, 997–998 (C. C. A. 7); *Hershey Chocolate Corp.* v. *F. T. C.*, 121 F. 2d 968, 971 (C. C. A. 3).

to adopt the proposed agreement would seem to evidence, not a purpose to terminate its participation in the agreement to maintain uniform prices, but dissatisfaction with the failure of the other parties to strengthen the agreement. As to petitioner Reyburn's reason for resignation, one of its officers testified that it felt that it was not "getting a return value from the money we invested from our dues," or from the time required for attendance at meetings (R. 281). Each of the two foregoing petitioners, following its resignation, continued to use the same zone system employed by the Association and its members (R. 74–75, 183–184).

In *Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. 2d 321 (C. C. A. 7), certiorari denied, 323 U. S. 730, which sustained an order of the Commission directed against a conspiracy to fix and maintain prices carried out through the medium of a trade association, the court upheld the application of the order to a corporation which had previously resigned from the association, saying (pp. 330–331): "The order to desist deals with the future, and we think it is somewhat a matter of sound discretion to be exercised wisely by the Commission—when it comes to entering its order."

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is therefore respectfully

submitted that the petition for a writ of certiorari should be denied.

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